

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

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MAY 21 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of

AMENDMENT OF THE COMMISSION'S
RULES TO PROVIDE CHANNEL EXCLUSIVITY
TO QUALIFIED PRIVATE PAGING SYSTEMS
AT 929-930 MHZ

PR Docket No. 93-35

To: The Commission

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SUMMARY

PacTel Paging ("PacTel") is submitting Reply Comments in PR Docket No. 93-35 in which the Commission is proposing rules to provide channel exclusivity to qualified private carrier paging systems operating in the 929 MHz - 930 MHz band.

PacTel has surveyed the twenty comments filed by other interested parties in this proceeding. Viewed as a whole, the comments provide substantial support for the Commission's proposal to allow PCP operators to utilize frequencies on an exclusive basis provided that certain minimum service and construction requirements are met. The only vocal opponent of the proposal, Radiofone, merely recycles arguments that were presented in earlier stages of this proceeding and have been explicitly rejected by the Commission.

The original comments filed by PacTel in this proceeding suggested minor revisions to the proposed rules. The comments filed by others in many respects confirm PacTel's concerns and reasoning. Consequently, PacTel urges the Commission to give serious consideration to the slight modifications PacTel has offered in connection with the Commission's proposed exclusive licensing plan.

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To: The Commission

REPLY COMMENTS OF PACTEL PAGING

PacTel Paging ("PacTel"), by its attorneys, hereby submits its Reply Comments on the Notice of Proposed Rulemaking^{1/} (the "Notice") which proposes amendments to the Commission's Rules to provide channel exclusivity in certain circumstances to qualified private carrier paging ("PCP") systems at 929-930 MHz. The following is respectfully shown:

1. The Commission received twenty comments in this proceeding representing a diverse group of paging interests.^{2/}

^{1/} FCC 93-101, released March 31, 1993.

^{2/} Comments were received from American Paging, Inc. ("API"), Arch Communications Group, Inc. ("Arch"), Association for Private Carrier Paging Section of the National Association of Business and Educational Radio, Inc. ("NABER"), Atlanta Voice Page, Inc. ("Voice Page"), BellSouth Corporation ("BellSouth"), Celpage, Inc. ("Celpage"), Industrial
(continued...)

Large companies (such as PacTel and PageNet), small paging companies (such as Porta-Phone and Voice Page) and various industry associations (such as NABER and ITA) commented in this proceeding. As is set forth below, almost all Commenters supported the proposal of granting 900 MHz PCP licensees exclusivity along the lines set forth in the Commission's Notice. Only one commenter, Radiofone, opposed outright the basic concept of exclusivity as proposed in the Notice.^{3/}

I. The Commission Has the Authority
to Grant PCP Frequencies on an Exclusive Basis
and it Should Not Delay this Proceeding

2. Radiofone argues that the Commission is without authority to grant exclusive PCP licenses.^{4/} This argument has been made previously by others in earlier stages of this

^{2/}(...continued)

Telecommunications Association, Inc. ("ITA"), Thomas W. Luczak ("Luczak"), MAP Mobile Communications, Inc. ("MAP"), McCaw Cellular Communications Inc., Paging Division ("McCaw"), Message Center Beepers, Inc. and Beepage, Inc. ("Message Center"), Metagram America Inc. ("Metagram"), Metrocall, Inc. ("Metrocall"), Mobile Telecommunication Technologies Corporation ("MTel"), PacTel Paging ("PacTel"), PageMart, Inc. ("PageMart"), Paging Network, Inc. ("PageNet"), Porta-Phone ("Porta-Phone"), Radiofone, Inc. ("Radiofone"), and Telocator ("Telocator"). Collectively, these interested parties are referred to as the "Commenters".

^{3/} Radiofone is the only Commenter opposing any sort of exclusivity. Two other commenters, BellSouth and McCaw, both suggest that the Commission delay acting on the Notice until it has addressed the disparities between common carrier and private carrier paging.

^{4/} Radiofone Comments at pp. 2-16.

proceeding.^{5/} Notably, the Commission expressly rejected this argument in the Notice by finding that the "legal distinction between private and common carriage does not turn on whether frequency assignments are exclusive or shared."^{6/}

3. Radiofone does not advance any new arguments, but rather continues to argue that somehow granting exclusivity would deprive states of the right to regulate.^{7/} Radiofone argues that exclusivity would (1) violate Congressional intent of Section 332,^{8/} and (2) preempt state regulation of paging on a *de facto* basis.^{9/} Neither of Radiofone's arguments withstands scrutiny. The meaning of Section 332 is plain. The distinction between private and common carrier services in Section 332 is determined by examining whether a service provides interconnection for hire to the public switched network.^{10/} As Radiofone itself points

^{5/} See, e.g., MTel Comments to the Petition for Rulemaking of the Association for Private Carrier Paging Section of the National Association of Business and Educational Radio, Inc., RM-7986 (Filed April 24, 1992) ("NABER Petition"). MTel also advanced the argument that to grant exclusivity would violate Section 332 of the Communications Act. See, MTel Comments at pp. 15-16.

^{6/} Notice at n. 33.

out, the Courts have found that paging carriers do not provide interconnection for hire because they provide delayed transmission of messages.^{11/} Therefore, the Commission has the authority to grant exclusive PCP licenses.^{12/}

4. Several Commenters request that the Commission examine the current regulatory distinctions between common carrier and private carrier paging operations and eliminate any disparities between them.^{13/} Some of these Commenters further suggest that the Commission delay implementing the proposed rules until the Commission undertakes a broader examination of the dichotomy in regulation between common and private carriage.^{14/}

^{10/} (...continued)

provided indiscriminately to eligible users on a commercial basis, except that a land station ... shall not be interconnected with a telephone exchange ... except to the extent that ... (B) licensees jointly obtain such interconnection directly from a duly authorized carrier. (emphasis added).

^{11/} Radiofone Comments at pp. 3-4 citing Telocator Network of America v. FCC, 761 F.2d 763 (D.C. Cir 1985).

^{12/} Radiofone's arguments even fail in services, such as SMR, where interactive interconnection is achieved. SMR was a service licensed prior to the enactment of the current Section 332. Congress knew that Section 332 would take such services outside the state regulatory grasp, but proceeded to enact the Section.

^{13/} Comments of BellSouth at pp 4-6, MTel at pp 14-16, McCaw at pp. 3-12, Radiofone at pp. 2-6, and Telocator at p. 7.

^{14/} See Comments of BellSouth at pp 4-6 and McCaw at pp. 3-12. MTel and Telocator both request that the Commission open a further proceeding to examine the distinctions between common and private carriage, but not to delay this proceeding. PacTel supports a further rulemaking to examine
(continued...)

This request should be rejected because delay would disserve the public interest.^{15/} While PacTel recognizes that there are inequities between these two services that should be addressed, it agrees with MTel and Telocator that the Commission should only address these issues via a further rulemaking after the conclusion of this docket.^{16/} Only in this way will PCP operators not be delayed in their efforts to more fully serve the public.

II. Construction Requirements Must Be Adopted Though Some Modifications of the Proposal Are in Order

5. The proposed construction requirements generated the most discussion from the Commenters of all of the proposals. The Notice proposed certain transmitter numbers and geographic distribution requirements for applicants for local, regional, and

^{14/}(...continued)

and eliminate all the burdens that common carriers bear that PCP operators do not. This need not, however, delay this proceeding since the public interest benefits of exclusivity have been demonstrated.

^{15/} In fact, the Commission found that such an inquiry was "beyond the scope of this proceeding." Notice at n. 33.

^{16/} See Comments of MTel at p. 16 and Telocator at p. 7. Indeed, some of the inequities, such as federal tariffing requirements, are already the subject of a Commission proceeding. See, Request of PacTel Paging for a Declaratory Ruling that Common Carrier Paging is an Exchange Service subject to State Regulation and Exempt from Federal Tariff Requirements, DA-93-400 (Released April 7, 1993). Also, there is "regulatory parity" legislation moving on Capitol Hill that could serve to eliminate some important distinctions between common and private carrier mobile services.

nationwide exclusivity.^{17/} In general, the Commenters supported the Commission's approach, although several Commenters suggest specific revisions worthy of consideration.

A. Number of Transmitters Required for Exclusivity

6. The Commission proposed that licensees be required to construct 6 transmitters in most urban areas and 18 in the three largest metropolitan areas with no more than a 25 mile separation between transmitters.^{18/} Eight Commenters specifically addressed this proposal.^{19/} Two Commenters -- MAP and Meta -- suggest that the proposed requirement that a licensee must have six contiguous transmitters to achieve exclusivity may be too great for most urban markets.^{20/} These companies use their current transmitter counts in markets to justify their position. Three Commenters -- ITA, NABER, and PageNet -- support the proposal set forth in the Notice.^{21/} The three remaining Commenters on this issue -- API, Metrocall and Porta-Phones -- proposed a greater number of transmitters per market in order to

^{17/} See, generally, Notice at ¶¶19-29.

^{18/} Notice at ¶¶20-21.

^{19/} Comments of API at p. 7, ITA at p. 3, MAP at n. 9, Meta at pp. 3-8, Metrocall at pp. 3-4, NABER at p. 8, PageNet at p. 13, and Porta-Phone at pp. 5-7.

^{20/} MAP at n. 9 and Meta at pp. 3-8.

^{21/} Comments of ITA at p. 3, NABER at p. 8, and PageNet at p. 13.

qualify for exclusivity.^{22/} These latter three Commenters essentially argue positions which were discussed and rejected during the extensive industry group meetings which led to the NABER proposal.

7. Given that the six and eighteen transmitter requirements in the Notice were hammered out by NABER through extensive discussion between industry participants and only a few Commenters opposed them, the proposal set forth in the Notice shpuld be adonted without alteration. The individual interests

B. Geographic Distribution Requirements

9. The Commission proposed requiring regional licensees to construct the number of transmitters required for local exclusivity in each of the top thirty markets in a given region. Only two Commenters addressed this issue -- PacTel and PageNet.^{25/} PageNet supports the Commission's proposal and PacTel opposed it. PageNet argues that this requirement would "ensure that 'no blocking out' of significant markets occurs through strategic placement of non-contiguous transmitters."^{26/} PacTel concurs with PageNet that the object of a geographic distribution requirement is to ensure that service is spread out over a reasonable portion of the geographic area. PacTel, however, suggested that the Commission could better achieve this objective by altering the requirements to more properly mirror the nationwide requirements.

10. PacTel proposed that a regional licensee be required to construct twelve markets in the region including a market in each RBOC region, if the region consists of more than one RBOC region.^{27/} PageNet's concern is addressed by PacTel's proposal because a licensee would potentially be required to cover more markets in the region than the proposed requirements

^{25/} See, Comments of PacTel at ¶¶15-17, and PageNet at pp. 17-18.

^{26/} Comments of PageNet at p. 18.

^{27/} Comments of PacTel at ¶17.

and ensure that it has dispersed them throughout the region.^{28/}
The Commission should, therefore, adopt PacTel's proposal.

11. The Commission proposed that nationwide licensees seeking exclusivity be required to construct facilities providing service in twenty-five of the top fifty markets in the United States, and in at least two markets in each RBOC region.^{29/} A few Commenters opposed this requirement and sought more stringent requirements.^{30/} PacTel disagrees with those Commenters who argue that the proposed requirements need to be strengthened. The current requirements were fashioned to prevent speculation, rather than to ensure that every population center in the United States received service. Indeed, the hallmark of private radio

^{28/} Under the Commission's proposal, a regional system may in fact have no top thirty markets included, thus the licensee would have no distribution requirements. PacTel's proposal would require greater distribution; and, thus, would better serve the public interest.

^{29/} Notice at ¶26.

^{30/} MTel seeks additional coverage of markets and to define coverage of a market to be coverage of 75% of the population of a market. MTel Comments at p. 9. It is interesting that MTel seeks to require nationwide PCP licensees to have greater coverage requirements than MTel itself must achieve as a common carrier nationwide licensee. Section 22.527(b)(5) of the Commission's Rules requires nationwide paging common carriers to "expand network services to the entire nation within two years." The Commission Rules do not define what constitutes coverage of the nation and does not address geographic distribution requirements. PageMart seeks to increase the two markets per RBOC region to five markets per RBOC region. PageMart Comments at pp. 13-14. PageNet suggested increasing the requirement to 50% of the population in each region the nationwide carrier seeks to offer service. PageNet Comments at pp. 20-21. Metrocall supported the Commission's proposed requirements. Metrocall's Comments at p. 6.

services has been the flexibility accorded the licensee to fashion the service to fit the licensee's particular target market segments. If a licensee has constructed enough of its system to meet the proposed requirements contained in the Notice, it will be forced by economics to provide service to the public to their particular target market segment.

C. Co-Location of Transmitters

12. In the Notice the Commission stated that "to prevent 'clustering' of multiple transmitters solely to meet the minimum threshold, we propose to prohibit licensees from using co-located transmitters to qualify for exclusivity."^{31/} This statement has generated a significant amount of controversy. Some of the Commenters interpret this aspect of the proposal to preclude the use of multiple frequency transmitters.^{32/} PacTel disagrees with those Commenters' interpretation. PacTel understands this statement to mean that a licensee could not count more than one transmitter at a location for exclusivity on the same frequency.^{33/} However, regardless of the Commission's

^{31/} Notice at ¶22.

^{32/} See, e.g., Comments of Arch at pp. 7-8, Luczak at pp. 2-4, Message Center at ¶3, PageMart at pp. 8-13, and PageNet at pp. 14-15.

^{33/} Indeed, this is the plain meaning of the Commission's statement. The Commission proposed this rule to prevent "clustering" of transmitters which plainly means the placement of more than one transmitter on the same frequency at a location. The co-location of multiple transmitters on
(continued...)

intent, PacTel concurs with the Commenters that disallowing multiple frequency transmitters to count towards exclusivity would not serve the public interest because it would lead to inefficient system design, unnecessary costs and less than optimal transmitter placement.^{34/} The Commission, therefore, should clarify that it sought merely to ensure that, although licensees could place more than one transmitter at a location for a frequency, the licensee would only receive credit for one transmitter at that location for that frequency.

D. Three Year Slow Growth Proposal

13. The Notice proposes that licensees applying to construct more than 30 transmitters could be granted slow growth status which would allow them up to three years to complete construction.^{35/} Only two Commenters opposed the Commission's

^{33/} (...continued)

a common frequency at a single site by a single licensee would have no public interest benefit, but could save the licensee money in its effort to artificially meet the transmitter requirements.

^{34/} PacTel disagrees with PageMart that multiple frequency transmitters should be counted less than one for each frequency. As has been demonstrated by PageMart with respect to increasing maximum power to 3500 watts E.R.P., the Commission should permit licensees to design their systems in the most efficient way possible. See, PageMart's Comments at pp. 15-16. The use of multiple frequencies in a transmitter would allow a licensee to serve different market segments from the same transmitter; thus, making the system more efficient.

^{35/} Notice at ¶31.

proposal.^{36/} These Commenters were concerned that the three year period could lead to warehousing of spectrum.^{37/} PacTel believes, however, that these fears are unfounded. The performance/forfeiture bond proposed by the Commission will eliminate any warehousing of spectrum by speculators.^{38/}

E. 3500 Watt Power Limit

14. As PacTel pointed out in its Comments, the Notice implies that PCP licensees may use up to 3500 watts effective radiated power.^{39/} Six Commenters joined PacTel in supporting a proposal to increase the maximum effective radiated power for 900 MHZ PCP licensees to 3500 watts.^{40/} These Commenters agree that increasing maximum effective radiated power levels would allow licenses to more economically and effectively provide service to the public, and, thus, serve the public interest. The Commission should, therefore, specifically amend its Rules to increase the

^{36/} Comments of MTel at pp. 7-8, and PageNet at p. 10. Six other Commenters specifically supported the Commission's proposal that licensees which propose systems with more than 30 transmitters would be eligible to be granted slow growth status. Comments of Arch at pp. 4-6, Celpage at pp. 12-13, ITA at pp. 5-7, NABER at pp. 13-14, Metrocall at p.7, and PacTel Paging at ¶¶19-21.

^{37/} Comments of MTel at pp. 7-8, and PageNet at p. 10.

^{38/} Notice at ¶31. See, also, PacTel's Comments at ¶¶19-21.

^{39/} See, PacTel's Comments at ¶22.

^{40/} Comments of API at pp. 9-10, Celpage at p. 12, NABER at p. 9, PacTel Paging at ¶22, PageMart at pp. 15-16, and PageNet at pp. 16-17.

maximum effective radiated power for 900 MHz frequencies to 3500 watts.

III. Licensing Issues

A. NABER Should be the Only Frequency Coordinator

15. The Notice proposes that an applicant be permitted to submit its application to one of three frequency coordinators -- NABER, ITA, and APCO.^{41/} Several commenters, however, opposed expanding the number of frequency coordinators.^{42/} PacTel agrees with these opposing Commenters that the use of more than one frequency coordinator can lead to confusion, delay, duplication of effort, and possible coordination errors.^{43/} The Commission, therefore, should abandon its proposal to add additional coordinators for the PCP frequencies.

B. The Commission's One Channel at a Time Proposal Should be Implemented

16. The Commission proposed that applicants for exclusive frequencies would be permitted to apply for only one

^{41/} Notice at ¶40.

^{42/} Comments of API at p. 11, Arch at p. 6-7, Celpage at pp. 13-14, NABER at pp. 9-13, PageMart at pp. 16-17, and PageNet at pp. 23-24. ITA supported the Commission's proposal. ITA Comments at p. 4.

^{43/} Comments of Arch at p. 6, PageMart at p. 17, and PageNet at p. 23.

channel at a time.^{44/} The Commission proposed this limitation to "prevent PCP operators from attempting to apply for multiple frequencies to block entry by potential competitors."^{45/} Several Commenters oppose the one channel limitation and propose applicants be permitted to apply for up to two frequencies at a time.^{46/} These Commenters expressed the concern that the current proposal could "chill innovation and investment."^{47/} PacTel believes that the Commission's proposal serves the public interest by assuring that applicants cannot warehouse spectrum by applying for more than one channel at a time. Consequently, the Commission should adopt its proposed one channel limit.^{48/}

^{44/} Notice at ¶34.

^{45/} Id.

^{46/} Comments of Arch at pp. 3-4, and Message Center at ¶4. Celpage, however, opposes the granting of more than one exclusive channel to any licensee. See, Comments of Celpage at pp. 9-10. ITA, MTel, and Metrocall supported the Commission's proposal. Comments of ITA at p. 7, MTel at pp. 10-11, Metrocall at p. 8, PageNet at p. 22.

^{47/} Comments of Arch at pp. 3-4.

^{48/} This limitation, however, should only operate to stop an applicant from seeking multiple exclusive channels. If an applicant already has an exclusive channel which has been constructed and that applicant seeks another channel, that is clearly permissible. Furthermore, if that same licensee wants to add the new channel and the existing exclusive channel to a new site which is within the exclusivity protection area, it should be able to do so irrespective of this limitation. The public interest would not be served by prohibiting a licensee from expanding coverage on an existing exclusive channel.

C. The Commission Should Adopt PacTel's
Proposal To Limit Additional Co-Channel
Applications during the Pendency of this Proceeding

17. PacTel, in its Comments, proposed that the Commission limit additional applications for channels which may be grandfathered for exclusivity.^{49/} MAP has also proposed the same limitation.^{50/} It would not serve the public interest to allow speculators to file applications on frequencies currently held by licensees who are building wide-area and nationwide systems. The Commission, therefore, should require NABER to limit any applications for channels which would enjoy exclusivity under the Commission's proposed rules.

IV. Exclusivity for Other PCP Frequencies
Should Await a Further Rulemaking

18. The Notice proposed that exclusivity for PCP frequencies apply only to the 929-930 MHz PCP frequencies.^{51/} The Commission rejected extending exclusivity to VHF and UHF PCP frequencies because "existing congestion in the 150 and 460 MHz bands raises obstacles to implementing exclusivity."^{52/} Several Commenters opposed limiting exclusivity solely to the 900 MHz

^{49/} Comments of PacTel at ¶27.

^{50/} Comments of MAP at p. 8.

^{51/} Notice at ¶39.

^{52/} Id.

band.^{53/} PacTel believes that exclusivity, or limited additional sharing, may be beneficial to the VHF and UHF PCP frequencies, but a complete record has not been developed at this time which would permit the Commission to extend the current proposed exclusivity for 900 MHz PCP frequencies to VHF and UHF frequencies. PacTel suggests that the Commission, however, entertain a further proceeding that explores whether additional limited sharing may be appropriate for the VHF and UHF PCP frequencies.^{54/}

^{53/} Comments of Celpage at pp. 4-9, Message Center at ¶¶6-11, Porta-phone at pp. 2-10, and Voice Page. Metrocall supported the Commission's proposal. See, Metrocall Comments at p. 9.

^{54/} Such a proposal might be that once a channel has a certain amount of airtime used, no additional licenses will be issued for that frequency within the same geographic area. This would permit the existing operators to continue to operate their systems while at the same time limit additional congestion from new licensees.

V. Conclusion

19. The foregoing premises having been duly considered, PacTel respectfully requests that the Commission expeditiously adopt final rules reflecting PacTel's comments.

Respectfully submitted,

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May 21, 1993

CERTIFICATE OF SERVICE

I, Tana Christine Maples, a secretary in the law firm of Bryan Cave, hereby certify that on this 21st day of May, 1993, a copy of the foregoing **REPLY COMMENTS OF PACTEL PAGING** was sent by first-class mail, postage pre-paid to each of the following:

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